Supreme Court, U.S.
FILED
JUL 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2012

In the Supreme Court

OF THE

United States

October Term, 1986

DR. CHARLES MILO CONNICK,
Petitioner,
VS.
TEACHERS INSURANCE AND
ANNUITY ASSOCIATION OF AMERICA AND
COLLEGE RETIREMENT EQUITIES FUND,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

KENT KELLER
STEVEN H. WEINSTEIN
BARGER & WOLEN
530 West Sixth Street
Ninth Floor
Los Angeles, California
(213) 680-2800
Attorneys for Respondent

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600

TABLE OF CONTENTS

Page

1.

Introduction 1

2.

The Petition Does Not Raise Important Questions of General Interest 3

3.

The Ninth Circuit Correctly Affirmed the District Court's Grant of Summary Judgment 5

4.

Conclusion 7

TABLE OF AUTHORITIES

Cases

Page

Anderson v. Liberty Lobby, Inc., ____ U.S. ____ (Slip Opinion, June 25, 1986) 4

Connick v. Teachers Ins. and Annuity Ass'n, 784 F.2d 1018 (9th Cir. 1986) 3, 5, 6

Ed Houser Enterprises v. General Motors Corp., 595 F.2d 366 (7th Cir. 1978) 4

Gans v. Mundy, 762 F.2d 338 (3d Cir. 1985) 4

Glenway Industries, Inc. v. Wheelabrator-Frye, Inc., 686 F.2d 415 (6th Cir. 1982) 4

Howard v. Russell Stover Candies, Inc., 649 F.2d 620 (8th Cir. 1981) 4

Maiorana v. MacDonald, 596 F.2d 1072 (1st Cir. 1979) 4

Massachusetts Mutual Life Insurance Co. v. Russell, ____ U.S. ____, 105 S.Ct. 3085 (1985) 5

Mercantile Bank & Trust v. Fidelity & Deposit Co., 750 F.2d 838 (11th Cir. 1985) 4

United States Steel Corp. v. Darby, 516 F.2d 961 (5th Cir. 1975) 4

Rules

Rules of the United States Supreme Court, Rule 17 3, 4

Rules of the United States Supreme Court, Rule 17.1(a) 4

Rules of the United States Supreme Court, Rule 17.1(b) 4

Rules of the United States Supreme Court, Rule 17.1(c) 4

TABLE OF AUTHORITIES

Page

Textbooks

Moore's Federal Practice, ¶ 56.23 at p. 56-1394 (Rev. 1985) 4

Wright, Miller, Cooper & Gresman, Federal Practice and Procedure (1977 Rev.) Sec. 4004, p. 507.... 5

Wright, Miller and Kane, Federal Practice and Procedure, Sec. 2716, p. 643 (1983 ed.) 4

No. 85-2012

In the Supreme Court

OF THE

United States

October Term, 1986

DR. CHARLES MILO CONNICK,
Petitioner,

VS.

TEACHERS INSURANCE AND
ANNUITY ASSOCIATION OF AMERICA AND
COLLEGE RETIREMENT EQUITIES FUND,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

I.

INTRODUCTION

The issue raised by Dr. Connick's[1] Petition is whether the Ninth Circuit misapplied the standard of review applicable to the grant of sumary judgment. That issue does not present a matter that is in conflict in the federal circuits or an important question of federal law not

[1]Throughout this brief Petitioner, Dr. Charles Milo Connick, is referred to as "Dr. Connick."

previously addressed by this Court. In short, the petition does not involve the kinds of special issues of general importance typically required for a hearing in this Court.

Dr. Connick's First Amended Complaint[2] consists of seven counts. The first six counts involve the same issue; fairly read, do the TIAA-CREF[3] annuities require a cash surrender, lump sum payment. The district court and the Ninth Circuit have answered that the annuities do not require such a payment, and Dr. Connick seems to have finally abandoned this argument. While not entirely clear, it appears that the sole issue raised by this petition concerns the seventh count — Dr. Connick's ERISA claim.

As regards to the ERISA claim, all the Ninth Circuit decided was that Dr. Connick had failed to offer any competent evidence suggesting the existence of a triable issue of fact, and that summary judgment was therefore appropriate. Dr. Connick concedes that the standard used by the Ninth Circuit for reviewing the district court's grant of summary judgment was appropriate, he simply contends that the Ninth Circuit misapplied its own standard. As such, the petition raises a very narrow issue: Did the Ninth Circuit misapply the standard for affirming the grant of summary judgment. Such an issue is one of individual justice, not of general interest, and is not appropriate for treatment by a writ of certiorari.

---

[2]See, Petition, Appendix D-1 through D-18.

[3]Throughout this brief Respondents, Teachers Insurance and Annuity Association of America and College Retirement Equities Fund, are referred to as "TIAA-CREF."

2.

THE PETITION DOES NOT RAISE IMPORTANT QUESTIONS OF GENERAL INTEREST

Rule 17 of the Supreme Court Rules states three general guidelines that, "while neither controlling nor fully measuring the Court's discretion," suggest the type of cases for which a writ of certiorari is appropriate. The first guideline concerns situations in which one circuit has reached a decision in conflict with the decision of another circuit on the "same matter." Here the only decision challenged by this petition is the granting of summary judgment on an ERISA claim. With respect to granting of a summary judgment itself, a conflict between the circuits is highly unlikely, since the individual situation presented will determine the result and thus the requirement of the "same matter" is inapplicable. However, the legal standard of review used by the Ninth Circuit could, of course, present a question of federal law as to which circuits could differ.

The Ninth Circuit began its discussion of the legal principles presented by this case with an explanation of the standard of review. The court states at page 1020:[4]

> "Appellate courts must review motions for summary judgment under the same standard as the trial court. (Citation omitted.) Summary judgment is appropriate where there are no issues of material fact and when the evidence, viewed in a light most favorable to the opposing party, entitles the movant to prevail as a matter of law. (Citation omitted.) The court shall consider all admissible affidavits and

---

[4]All page citations to the Ninth Circuit's decision refer to the reported opinion, *Connick v. Teachers Ins. and Annuity Ass'n*, 784 F.2d 1018 (9th Cir. 1986).

supplemental documents on a motion for summary judgment. (Citation omitted.)"

If the Ninth Circuit had stated a standard at variance with that used in other circuits, an issue within the scope of Rule 17.1(a) might have been presented. However, the foregoing standard is common for all federal circuits.[5] Thus, this case does not present a matter as to which federal courts have different rules.

Subsection (b) of Rule 17.1 involves state court decisions and is therefore irrelevant. Subsection (c) applies when either a state or federal court "has decided an important question of federal law which has not been, but should be, settled by this Court. . . ." Not only is this standard of review stated by the Ninth Circuit common among federal courts, but this court recently followed this standard in *Anderson v. Liberty Lobby, Inc.*, ____ U.S. ____ (Slip Opinion, June 25, 1986).

Thus, the guidelines of Rule 17 are not met in this case. Ultimately, Dr. Connick's disagreement with the Ninth Circuit is not over the rule of law, but how that rule is applied. Such a disagreement falls under the heading of a case seeking "individual justice" which historically this Court has been disinclined to hear by a writ of certiorari.

---

[5] *See e.g. Gans v. Mundy*, 762 F.2d 338, 340-41 (3d Cir. 1985); *Mercantile Bank & Trust v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985); *Glenway Industries, Inc. v. Wheelabrator-Frye, Inc.*, 686 F.2d 415, 417 (6th Cir. 1982); *Howard v. Russell Stover Candies, Inc.*, 649 F.2d 620, 623 (8th Cir. 1981); *Maiorana v. MacDonald*, 596 F.2d 1072, 1076 (1st Cir. 1979); *Ed Houser Enterprises v. General Motors Corp.*, 595 F.2d 366 (7th Cir. 1978); *United States Steel Corp. v. Darby*, 516 F.2d 961, 963 (5th Cir. 1975); *Moore's Federal Practice*, ¶56.23 at p. 56-1394 (Rev. 1985); Wright, Miller and Kane, *Federal Practice and Procedure*, § 2716 at p. 643 (1983 ed.).

Wright, Miller, Cooper & Gresman, *Federal Practice and Procedure*, § 4004 at 507 (1977 Rev.).

3.

THE NINTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT

In an effort to escape the "individual justice" conclusion, the petition asserts that the Ninth Circuit disregarded this Court's decision in *Massachusetts Mutual Life Insurance Ins. Co. v. Russell*, ____ U.S. ____, 105 S.Ct. 3085 (1985). In fact, while the parties had briefed *Russell*, the Ninth Circuit makes no mention of this decision because it had no effect on its ruling. Dr. Connick seems to argue that under *Russell* he had standing to assert an ERISA claim. While the extent of the claim Dr. Connick could assert was the subject of some dispute in the court below, Dr. Connick's basic standing to raise the claim has never been disputed. Thus, the significance of *Russell* to this case, as viewed by Dr. Connick, is not clear.

As regards to Dr. Connick's ERISA claim, all the Ninth Circuit determined was that Dr. Connick had failed "to allege specific facts to show that there is a genuine issue for trial." *Connick, supra* at 1022. The Ninth Circuit never intimated that Dr. Connick did not have standing to pursue his claims. It determined that he had failed to meet the force of the summary judgment motion. Thus, whatever the ultimate dimensions of *Russell* are determined to be, this case does not raise a *Russell* issue.

With respect to the grant of summary judgment, it is important to note what the petition overlooks. TIAA-CREF prevailed on their initial motion on July 23, 1984. While the motion was granted, leave to amend was also

granted. Within a matter of days thereafter, Dr. Connick filed a First Amended Complaint which was almost a copy of the original complaint. Significantly, no new factual matters were alleged. The major change was that Dr. Connick dropped state law claim and added the ERISA claim. Thereafter TIAA-CREF again moved for summary judgment which also was granted.

At no time from the commencement of this action in February, 1984 until its disposition almost eight (8) months later in November 1984, did Dr. Connick conduct, or ever attempt to conduct any discovery. The sole "evidence" which Dr. Connick relied upon was a magazine article written by a gentleman critical of TIAA-CREF. As respects the charge of ERISA violations, all Dr. Connick apparently did was read this article and file a complaint. Under these circumstances the Ninth Circuit correctly determined that Dr. Connick could not rest "on the mere allegations of his complaint," and that Dr. Connick had failed "to allege specific facts" indicating the existence of a triable issue of fact. *Connick, supra* at 1022.

Finally, Dr. Connick's petition does not suggest disagreement with the Ninth Circuit's conclusion that TIAA-CREF annuities are not ambiguous. As Dr. Connick appears to have abandoned all of the claims in the first six counts of the First Amended Complaint, TIAA-CREF do not discuss these matters, except to say that the Ninth Circuit's treatment of these matters, contained at pages 1020 through 1022, is correct.

4.

CONCLUSION

Litigation typically involves at least one happy and one unhappy party. This Court has historically refused to function as a second level appellate court, realizing its limited resources and the imperative need to focus those resources on cases involving important questions of law of great general interest. This is not such a case and the petition should be denied.

DATED: July 3, 1986

Respectfully submitted,
BARGER & WOLEN
By KENT KELLER
STEVEN H. WEINSTEIN
Attorneys for Respondent
Teachers Insurance and
Annuity Association and
College Retirement
Equities Fund

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 3, 1986, I served the within Response to Petition for Writ of Certiorari in re: "Dr. Charles Milo Connick vs. Teachers Insurance and Annuity Association of America and College Retirement Equities Fund" in the United States Supreme Court, October Term 1986, No. 85-2012;

on the Parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

J. Thomas Gilbride
7624 S. Painter Avenue
Second Floor
Whittier, California 90602

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on July 3, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA